In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-47

JAMES C. WORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 29) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1971. The petition for a writ of certiorari was filed on July 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case it was plain error for the prosecutor to call a witness who invoked her Fifth Amendment privilege against self-incrimination and refused to testify.

442-274—71

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and co-defendant Michael Sassin were convicted of uttering as true a government check bearing the forged endorsement of the payee, in violation of 18 U.S.C. 495 and 2. Petitioner was committed to the custody of the Attorney General for study and observation under the provisions of 18 U.S.C. 4208(b). The court of appeals affirmed *per curiam* (Pet. App. 29).

The operative facts are not in dispute. On December 12, 1967, a United States government social security check in the amount of $4,091.70 was issued to Fern E. Bonner. The check was stolen by the manager of Mrs. Bonner's apartment, who gave it to one Ellington (Tr. 134–135, 104–105). Subsequently, on March 11, 1968, petitioner deposited the check to his bank account; it bore a forged endorsement of Mrs. Bonner (Tr. 263), and petitioner's genuine endorsement. On March 21, 1968, petitioner issued two checks, one to co-defendant Sassin in the amount of $2,000, and the second to one Maxine Green for $1,091.70. On each check was typed, "Client's share of recovery of $4,091.70 debt."

When petitioner was later arrested, a woman identified afterwards as Maxine Green was in his apartment (Tr. 176). At the time of his arrest, petitioner denied that he knew anyone named Maxine Green (Tr. 178). Testimony at the trial indicated that petitioner had frequently been seen in the company of Maxine Green and Sassin, and that Maxine Green referred to petitioner as her husband (Tr. 191–192, 197–198).

Petitioner testified in his own behalf. He stated that Sassin brought him the $4,091.70 check and asked if it was good, saying that he had $2,000 coming from it and that petitioner could have twenty-five percent of the proceeds as his fee. A vice president of the bank had told him to deposit the check to his account. After the check had cleared, he gave Sassin a check for $2,000 and Miss Green a check for $1,091.70, on the understanding that she was to receive that for finding Sassin a lawyer whom he could trust. Petitioner explained that he had some doubt in his mind about this check and told Sassin and Miss Green they should hold on to the proceeds for at least six months (Tr. 270–273). However, he did not have Sassin endorse it, feeling that he should assume full responsibility as attorney (Tr. 276).

Evidence restricted to the question of petitioner's intent was admitted showing that he had cashed another United States Treasury check dated May 29, 1968, in the amount of $421.76, payable to another party. That check also bore the false endorsement of the payee (Tr. 208–210, 263–264). According to petitioner, Sassin brought him that check as well, and he cashed it for a similar fee (Tr. 277).

Miss Green was called as a government witness. When asked if she knew petitioner, she answered, "I have been advised by counsel that I should refuse to answer on the grounds that it may incriminate me." At that point, a partner of petitioner's attorney present in the court stated that she represented Miss Green and had advised her that any answers in this matter

might incriminate her. Miss Green had been arrested and arraigned for her part in cashing the check. Though the charge against her had been dismissed a few days before petitioner's trial, Miss Green's attorney expressed concern that she could be charged again. When Miss Green's attorney indicated that she had advised her not to answer all questions, the government attorney did not question her further (Tr. 268–269). Defense counsel did not question her or object. The court charged, *inter alia* (Tr. 375):

> In this case, as you will recall, one witness refused to answer on the grounds of the Fifth Amendment, on the grounds of self-incrimination; and I instruct you that a witness has the right to refuse to answer questions on the grounds of self-incrimination. It is important to remember that no inferences should be drawn as to what the answer might have been nor should the fact that a witness refuses to answer certain questions be construed against a defendant in any way since the witness, by so refusing to answer, merely stands upon her constitutional right not to subject herself by self-incrimination to a possible criminal prosecution.

ARGUMENT

Petitioner claims that he was unfairly prejudiced and denied the effective assistance of counsel by reason of the prosecutor calling Miss Green as a witness when he knew that she would refuse to testify on self-incrimination grounds. There is, however, no record support for the assertion that the prosecutor knew of Miss Green's intentions. Merely because Miss Green

was implicated with petitioner did not indicate that she would refuse to give any information concerning the transaction, particularly in light of the fact that the charges against her had been dropped. Petitioner's attorney, whose firm represented Miss Green, did not notify government counsel that Miss Green would refuse to testify, or request that the matter be screened outside the presence of the jury. See *Welch* v. *United States*, 371 F. 2d 287, 293 (C.A. 10), certiorari denied, 385 U.S. 957.

As soon as Miss Green claimed the privilege, the interrogation ceased; there was no repetitive questioning. And the trial judge admonished the jury that Miss Green's refusal to testify was perfectly proper. In these circumstances, it is clear that government counsel was not trying to improve the government's case by inferences arising from Miss Green's claim of the testimonial privilege; her refusal to answer did not add critical weight to the case against him; and there was no plain error by reason of this occurrence. *Namet* v. *United States*, 373 U.S. 179; *United States* v. *McKuin*, 434 F. 2d 391, 397–398 (C.A. 8), certiorari denied, 401 U.S. 911; *United States* v. *Roselli*, 432 F. 2d 879, 902 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Brickey*, 426 F. 2d 680, 688 (C.A. 8), certiorari denied, 400 U.S. 828; *Birns* v. *Perini*, 426 F. 2d 1288, 1292–1293 (C.A. 6), certiorari denied, May 3, 1971 (No. 630, O.T. 1970).

Petitioner was not denied the effective assistance of his retained counsel by reason of the prosecutor calling Miss Green, as he asserts (Pet. 23–27). Miss Green was not represented by petitioner's lawyer, but by

another member of that lawyer's firm, who, while present during the trial, remained silent except for the colloquy concerning Miss Green. The prosecutor could have done nothing to alter petitioner's or Miss Green's choice of attorney or to avoid what petitioner characterizes as a conflict of interest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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